No. 1225

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IN THE

Supreme Court of the United States

OCTOBER TERM—1941

JOSEPH H. MOSKOWITZ,
Petitioner,
—against—
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Joseph H. Moskowitz, respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit affirming a conviction in the United States District Court for the Southern District of New York under an indictment charging wilful attempt to evade and defeat the income taxes of Joseph M. Schenck for the calendar year 1936 (Count 2), in violation of Section 145 (b) of the Revenue Act of 1936 (Section 145 (b) of Title 26 U. S. C.).

The Statute.

Petitioner is charged with violating Section 145 (b) of the Revenue Act of 1936. This section provides:

"* * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or

the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000. or imprisoned for not more than five years, or both, together with the costs of prosecution."

Opinion Below.

The Opinion of the Court below dated March 21st, 1942, not yet reported, is annexed to the certified transcript of the record (R. 3616-30).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 6, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (U. S. C. Title 28, Sec. 347 (a)), and the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

On April 6, 1942, the Court below granted petitioner's motion to stay the issuance of its mandate pending the application to this Court for a writ of *certiorari*.

Summary Statement of Matters Involved.

Petitioner has been associated with Joseph M. Schenck in various capacities in the motion picture industry from 1918 to date. Schenck, in 1936, was chairman of the board of directors of Twentieth Century-Fox Film Corporation (R. 1482) and for years has been one of the leaders of the motion picture industry (R. 1470-3, 1477-8). Schenck's standing in the industry was due largely to his ability to deal with the temperamental stars and actors in the industry (R. 1231-2). To broaden and strengthen his contacts with the motion picture people, Schenck entertained lavishly (Ex. A-6, R. 2976; R. 1786; R. 1500). Petitioner's duties

included the supervision and responsibility for Schenck's books and tax returns. Each year petitioner compiled the necessary data needed for Schenck's federal income tax return and submitted it to an experienced tax accountant, who prepared the returns from information supplied him by petitioner (R. 1488, 1491-5). Petitioner himself is neither a tax expert nor an accountant (R. 1486-7).

Petitioner and Schenck were indicted on four counts:

Count one charged that the attempt was made for 1935 by (a) wilful failure to report $2,000. of income; (b) fraudulent deductions of about $276,000. of stock sales losses, and (c) fraudulent deductions of about $25,000. of business and entertainment expenses.

Count two charged a similar attempt for 1936 by deductions of about $40,000. of business and entertainment expenses.

Count three charged a similar attempt for 1937 by (a) deductions of about $85,000. of business and entertainment expenses, and (b) wilful failure to report income of $100,000.

Count four charged a conspiracy to commit the substantive crimes stated in the first three counts.

Petitioner and Schenck were tried together. After a 6 weeks' trial, petitioner was found guilty only on count two, was acquitted on counts one, three and four, was fined $10,000. and sentenced to imprisonment for a year and a day. Schenck was convicted on counts one and two, and was acquitted on counts three and four.

Each of the substantive counts involved business expense deductions essentially of the same type consisting mainly of entertainment and traveling expenses, and were computed

by a similar estimate method* (R. 359, 1496). The same method had been used without challenge in preceding years (R. 1515).

The assignments of error which are urged deal with count 2 and here include errors with respect to the admission and exclusion of evidence, and errors in the Court's charge and refusal of requests to charge.

I.

The erroneous admission of Exhibit 148.

At the trial the Government introduced Exhibit 148, a copy of which is printed in the appendix hereto. This exhibit is a recomputation of the additional taxes claimed by the Government to be due.

Of a total spent in 1936 of about $220,000** (R. 1127; 2747), only $44,676.60 (R. 2882) was the subject of the fraud charged in the indictment. Vouchers covering these expenses were in envelopes which were introduced en masse in evidence as Exhibits 8-f, 8-g, 8-h, 8-l, and 8-m. Of these vouchers,*** some showed on their face that they were for business purposes, others that they were for personal purposes; but in a vast majority of cases the vouchers themselves did not show on their face whether the expenses which they covered were for personal or for business purposes.

Apart from the vouchers, the testimony on the subject was substantially as follows: As to $4,792.46 of "Hotel" expenses, $50. of "Dues and Memberships", $1,124.33 of

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* At the outset, it should be noted that petitioner under his estimate system, did not deduct particular expenses per voucher, but used the items to reach a fair over-all estimate of business entertainment and travelling expenses to be deducted (R. 1496-7).

** Exclusive of approximately $315,000. Federal and State Income taxes (R. 2881; 1932) and $47,153.91 Federal gift tax (R. 3339) reported and paid for 1936.

*** Only a few vouchers were ever shown to or examined by the jury.

"Cafe" expenses, totaling less than $6,000., there was testimony which tended to show that a substantial part of these expenses covered by vouchers was personal. But as to about one-half of even these items, the Government did not sustain its burden of proof. Thus the Government's proof involved a sum which must under the circumstances of this case be regarded as trivial.

In this state of the record, Government's Exhibit 148 (R. 2881-2) was admitted in evidence and this admission was prejudicial and serious error. It was prepared by Mr. Gibney, a revenue agent of twenty-years' experience. Gibney testified that the United States Attorney, Mr. Correa, directed its preparation and told him in detail what deductions to allow and to disallow (R. 1006-8). The exhibit was not shown to have been based on anything other than the arbitrary directions of Mr. Correa. Gibney testified as to which particular vouchers he allowed as deductions and which he disallowed, and the only basis that he gave for excluding vouchers was the direction of Mr. Correa.

It is startling that this exhibit allowed Schenck only $483.50 for business travelling and entertainment expenses for 1936.

Petitioner contends on this record that the admission of the exhibit was reversible error, for the following reasons:

(1) There is no basis in the evidence except the fact of Mr. Correa's direction to support the disallowance of expenditures as shown in the exhibit.

(2) Insofar as the exhibit purports to record what Mr. Correa said, it is hearsay.

(3) The admission of the exhibit cannot be supported as a hypothetical question, as contended by the Government, because the witness did not base the conclusions in the ex-

hibit on assumptions given to him, and the jury were not told what the factual bases were nor that these bases were only assumptions the correctness of which it was their function to decide.

(4) To the jury it represented the improper, disguised, expert testimony of Gibney.

II.

The erroneous refusal of the Trial Court to limit the issues to business expense deductions and the confusing charge regarding gambling.

The only charge in the second count of the indictment relates to the deductibility of business expenses and there is no charge of omitted income (R. 17). Nevertheless the Trial Court refused to instruct the jury (R. 1864) as follows:

> "The charge of fraud in the second count is limited to the claim of deductible expenses in the amount of approximately $40,000."

Because of its relevancy to a 1937 issue dealing with $100,000. of alleged unreported income, a great mass of evidence was admitted involving a 1936 election bet. This evidence tended to show that in 1936 petitioner, on instructions from Schenck, placed two cash bets totaling $25,000. against $15,000. that Roosevelt would be elected President (R. 325-6, 666-8, 676-683, 1561-2). After the election $40,000. cash was collected by petitioner and turned over to Schenck (R. 327, 329, 667-71, 677-80, 1561-2, 1577-8, 1685-92, 1752-3, 1768-9); but this item was not completely entered on Schenck's books. The gain was not, and we contend need not have been, reported on Schenck's tax return, because of offsetting losses (R. 1578, 2747, line 12 "Exchange"*).

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* Schenck's books carried gambling transactions under the caption of "Exchange" (R. 68).

Since the record teems with evidence bearing on this 1936 election bet, petitioner requested the instruction above quoted to remove all possibility of a jury verdict on these election bet winnings.

Not only did the Court refuse to charge as requested, but in fact gave a charge which must have been confusing to the jury and which allowed them to consider the element of gambling in 1936 as a ground for conviction (R. 1823).

In part, he further charged (R. 1839):

> "In order for you to find that sums received by the defendant Schenck *during any of the taxable years* constituted income to him, it is not necessary for the government to prove the exact source of that income.
>
> "If you find from the evidence in the case that the defendant Schenck had a net income from gambling transactions, the mere fact that he derived this income from gambling does not exempt him from reporting such income on his tax returns. *In other words, income derived from gambling is as taxable as income derived from any other source.*
>
> "You are to consider whether the defendant Schenck failed to report income from his gambling transactions * * *" (Italics ours.)

That the jury were in fact confused is shown by the request which they made for additional guidance during their deliberations and the colloquy which followed that request (R. 1855); also by the fact that petitioner was acquitted on counts one and three which involved similar business entertaining and travelling expenses, which were actually twice as great in 1937 as in 1936.

III.

In fundamental respects the jury were not correctly instructed on the law, and thus the petitioner was deprived of a fair trial.

(a) ***The jury were given conflicting instructions on the elements of the crime charged.***

The Court charged that in the first three counts the elements of the crime, for the years 1935, 1936 and 1937 were two: (1) whether defendant Schenck owed more than he reported; and (2) whether there was a wilful intent to evade and defeat any part of the tax by filing a fraudulent tax return (R. 1827).

Later, referring to count three, he charged that the mere fact that Schenck may have overpaid his income tax for 1937 did not excuse him or Moskowitz from criminal liability (R. 1838). To the jury and in fact, there could be no difference in the elements of the crime between 1937 and 1936. On the face of the charge, without reference to any detailed facts, it thus appears that the very nature of the crime for which the petitioner was convicted was defined in contradictory terms and must necessarily have been misleading. There was no way for the jury to tell whether or not as a matter of law a tax deficiency was an essential part of the crime.

The Court below recognizing the error, held it to be non-prejudicial, first, because the Trial Court had expressly referred to the acquittal year 1937, and second, because even assuming the charge applied to 1936, still the Trial Court had previously given the correct rule. Obviously, where the same charge gives the rule both correctly and incorrectly, a jury is not in a position to know which statement is correct.

(b) ***The Trial Court erroneously refused to charge that a deduction of a proper item claimed at the trial should be allowed even though not claimed on the tax return.***

There was evidence that Schenck had omitted to take in his income tax return certain deductions to which he was legally entitled. Petitioner requested a charge (R. 1862) that "even if the taxpayer did not claim the item at all in his return, if it be a proper adjustment he is entitled to it, and this rule must be taken into consideration in determining whether there was in fact any tax due over and above that which he paid".

The Trial Court refused the requested instruction and gave no instruction at all on this topic. There is nothing to show what, if any, of the deductions claimed in the return, the jury disallowed, and therefore it is impossible to say whether petitioner's proof of additional deductions would or would not have off-set the disallowed deductions.

(c) ***The Trial Court erroneously refused to define "ordinary and necessary" and substituted the test of "legitimate."***

The defense requested the Court to define the statutory words "ordinary and necessary" in the tax law relating to deductible business expenditures and in this connection to charge that in determining whether an expense was "ordinary" regard must be given to all the circumstances, including time, place, nature of business, nature of the individual, standards of the industry, expenses made by others in the same line of business, and other similar circumstances (R. 1868), and to define "necessary" as "appropriate and helpful" (R. 1868). The Court refused these requests and instead, defined "ordinary and necessary" as "legitimate" (R. 1841-2).

(d) ***The Trial Court erroneously instructed the jury as to the law dealing with the making of an estimate.***

In substance the Court charged (R. 1843) that where an item is partly business and partly personal the taxpayer may not apply an estimated percentage to that item if he "could obtain" information from which he could make an accurate allocation. The Court gave no limitation or qualification to the duty thus imposed of exhausting all possible means of obtaining information before the right to make an estimate arises.

This complicated case required the simplest and clearest statement from the Court as to the law on the important subject of estimates. The Court's charge was such that no lay jury could fairly be expected to understand it.

The Trial Court charged that an estimate could be made in only one particular way—by gathering together all possible information and by ruling out all purely personal items (R. 1842-3). It charged that this was "the situation" in which an estimate might be used. The Court below, by its affirmance, sanctioned this charge. The petitioner's method of estimating was different. He based deductions on an over-all picture of the taxpayer's expenditures, and provided for possible erroneous excesses by deliberately excluding some other items or categories of items which would have been deductible* (R. 1496-7; Ex. 88, R. 2747).

We contend that any fair system or method of estimating may be used, notwithstanding that two different men may not reach the same estimated deduction or follow the same route to an ultimate figure; and that the method used by petitioner was fair and proper.

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* Thus compensation was made to correct excesses, if any, in the so-called though minor 100% deducted categories. In fact these categories represented 100% of only California items, but the amounts were less than 100% of California and New York items, combined (R. 2747).

(e) ***The Trial Court gave erroneous instructions as to Schenck's right to deduct business entertainment expenses at home.***

The total amount of Schenck's expenditures for running his homes was $29,951.87 (Ex. 148, R. 2882). Of this amount Schenck claimed on his tax return 50% or $14,975.93 as estimated business deduction. There was evidence tending to show substantial entertainment at home for business purposes (R. 430-1; 473).

Because of the importance of the question in the instant case and because a lay jury might be apt to disregard entertainment expenses at home, the petitioner requested a charge that the tax law permits deductions for such entertainment expenses "whether at home or away from home" (R. 1862). The Court refused this charge and instead, told the jury that "traveling and living expenses while away from home and entertainment" can be deducted as business expenses (R. 1841). If the meaning of the charge as given was to exclude entertainment expenses at home, then the charge was erroneous because it gave an incorrect rule of law. If that was not the meaning of the charge then the charge was erroneous because it was ambiguous on an important subject where the petitioner was entitled to have the correct rule of law, as stated in the request, clearly given to the jury.

IV.

The erroneous exclusion of the testimony of Revenue Agent Mulligan.

A Revenue Agent, Mulligan, was subpoenaed by the defendants. When Mulligan was called to the stand counsel for the Treasury stated (R. 1249) that Treasury agents under the regulations (see appendix) are prohibited from testifying in any Court without permission of the Department,

under penalty of fine, imprisonment and dismissal. No permission had been obtained and the Court refused to let Mulligan testify. Counsel for the petitioner asked leave to make a record. The Court ruled:

> "I don't think there is any point in your making a record in view of what has taken place" (R. 1251).

It will be observed that the ruling of the Trial Court was not directed to the competency of the subject matter of any questions but to the competency of the witness in his capacity as a revenue agent. Again after some discussion the Court ruled:

> "It appears that no permission has been obtained and therefore it will be illegal and improper and a violation of the law to permit the witness to testify. In the absence of that the objection is sustained.
> "Mr. Corbin: Exception" (R. 1253).

It was the purpose of petitioner's counsel to ask this and other witnesses* questions concerning the practice of the Treasury Department with respect to estimating amounts to be allowed as deductions for business and entertainment expenses (R. 1254-5; 1254-66). The Court below ruled that no constitutional question was presented by the record because the only question propounded to Mulligan related to dividends in Schenck's returns for 1937. It ignored the fact that the Trial Court excluded the testimony not because the questions were incompetent but because it held that it was incompetent for the witness to testify.

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* Colin, Jacobs and Yarmis.

V.

The erroneous refusal to charge as requested and the erroneous charge regarding the weight to be given to character evidence.

The petitioner could not be convicted of the crime charged even if there were error in the returns, without wilful intent to evade. The evidence of character witnesses was material and important regarding such intent. The Court in its charge minimized the importance of this testimony (R. 1829-30). Counsel for petitioner requested a charge (R. 1861) approved by this Court in *Edgington* v. *U. S.*, 164 U.S. 361. The charge was refused. The specific point of difference between the charge as given and as requested was the very important one that character evidence might *itself,* considered with all the other evidence, be deemed sufficient to raise a reasonable doubt.

Questions Presented.

Petitioner was convicted of an attempt to evade or defeat the income taxes of Schenck for 1936. The affirmance below raises the following principal questions in connection with said crime:

I—Whether Government's Exhibit 148 was erroneously admitted in evidence.

II—Whether the refusal of the Trial Court to limit the issues to business expense deductions and its confusing charge regarding gambling constituted reversible error.

III—Whether the petitioner was fundamentally deprived of a fair trial because the jury were not correctly instructed on the law, through (a) conflicting instructions on the elements of the crime; (b) refusal to charge that a deduction of a proper item claimed at the trial, though not claimed on the tax return, should be allowed; (c) refusal to define "ordinary and necessary" and substitution of the test of "legitimate"; (d) the erroneous instruction as to the law dealing with the making of an estimate; and (e) erroneous charge regarding deductibility of business entertainment expenses at home.

IV—Whether the exclusion of the testimony of a Revenue Agent subpoenaed by the petitioner constituted reversible error and deprived petitioner of constitutional rights.

V—Whether the refusal to charge as requested and the erroneous charge regarding the weight to be given to character evidence constituted reversible error.

REASONS FOR WRIT OF CERTIORARI

I.

The erroneous admission of Exhibit 148.

a) The decision of the Court below holding admissible Exhibit 148 is in conflict with a decision of another Circuit Court of Appeals on the same matter. The Circuit Court of Appeals of the Seventh Circuit held that testimony of an expert witness which invaded the province of the jury is erroneously admitted.

U. S. v. *Johnson*, 123 F. (2d) 111 (C. C. A. 7).*

b) This Court granted a writ of *certiorari* in the *Johnson* case on February 2, 1942, and thus has the question here presented pending for consideration before it. The case has now been assigned for reargument next October.

c) Two important questions of federal law, both of which are novel in this Court, are involved: (a) whether a tax deficiency can be proved by an unsupported exhibit of this character based on directions of the United States Attorney; and (b) whether conviction of the crime of tax evasion can properly be based on such an exhibit.

d) To the jury, this was an unrecognized disguise for the improper expert testimony of the expert Gibney. In a criminal case, such a device creates confusion as to its meaning and has an incalculably vicious effect. Its use should not be permitted in the interests of the fair administration of justice.

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* The Court below recognized the existence of the conflict in its opinion which said: "The appellants urge that such a ruling is contrary to *U. S.* v. *Johnson*, 123 F. (2d) 111 (C. C. A. 7). We are disposed to think that case distinguishable; if not, we prefer to follow Judge Evans' dissent."

e) The decision of the Court below by its affirmance of the admissibility of Exhibit 148, in view of the circumstances, has so far sanctioned a departure by the Trial Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

II.

The erroneous refusal of the Trial Court to limit the 1936 issue to business expense deductions and the confusing charge regarding gambling.

In holding that the Trial Court committed no reversible error in refusing to charge and in charging as it did, the Court below applied a test for reversible error which is in conflict with and disregards the established rule of law, that where there is a *fair possibility* that the jury may have been misled, reversible error has been committed.

III.

The petitioner was deprived of a fair trial in that the jury was not adequately instructed as to the fundamental questions of law involved.

The Court below has erroneously decided important questions of federal tax law and criminal law, which have not been but should be settled by this Court.

The Court below has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such departure by the Trial Court as to call for an exercise of this Court's power of supervision.

The Court below has decided federal questions in a way probably in conflict with applicable decisions of this Court,

to-wit: that the test of reversible error, due to ambiguity, erroneous instruction, or entire lack of instruction, is whether or not there is a fair possibility that the jury may have been misled, or may not have applied the correct law.

As to the features of tax law involved, these questions are novel and affect many thousands of taxpayers and are therefore of fundamental importance.

The decision of the Court below holding that the concededly erroneous charge was non-prejudicial on the ground that the Trial Court had previously given a correct charge on the elements of the crime is in probable conflict with applicable decisions of this Court,

Mills v. *U. S.*, 164 U. S. 644

and is also in conflict with decisions of other Circuit Courts of Appeals on the same matter.

Nicola v. *U. S.*, 72 F. (2d) 780 (C. C. A. 3);
Kuhn v. *U. S.*, 42 F. (2d) 210 (C. C. A. 3).

To the extent that the Court below sanctioned admittedly conflicting instructions, the opinion is palpably erroneous on its face.

The refusal to charge as requested was in conflict with the rule of this Court that it is reversible error for a Trial Court to refuse to grant a request outlining the elements of a crime specifically set forth in a statute, and that there is an implied direction to enumerate such elements, when a request therefor is made.

IV.

The erroneous exclusion of the testimony of Revenue Agent Mulligan.

The holding of the Court below that a specific offer of evidence was needed and that no constitutional question was presented by the record is in conflict with the holding of this Court in *McCandless* v. *U. S.*, 298 U. S. 342 that a specific offer of evidence is not needed where an entire class of evidence has been in advance formally declared inadmissible by the Trial Court during a preliminary argument or colloquy.

The refusal of the Court below to pass on a constitutional question presented deprives petitioner of his constitutional rights under the Sixth Amendment.

V.

The erroneous refusal to charge as requested and the erroneous charge regarding the weight to be given to character evidence.

The instruction approved by the Court below was so one-sided as to constitute an improper comment in violation of the principles laid down by this Court in *Quercia* v. *U. S.*, 289 U. S. 466.

This question has not been passed on by this Court since *Edgington* v. *U. S.*, 164 U. S. 361 (1896). Confusion on the subject exists in the opinions of various Circuit Courts of Appeals.

WHEREFORE, your petitioner prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send

to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that the petitioner be granted such other and further relief as may seem proper.

Dated, New York, N. Y., May 7, 1942.

JOSEPH H. MOSKOWITZ,
Petitioner.

By JOHN W. DAVIS,
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IN THE

Supreme Court of the United States

OCTOBER TERM—1941

JOSEPH H. MOSKOWITZ,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinion Below.

The opinion of the Court below, dated March 21, 1942, not yet reported, is annexed to the certified transcript of the record (R. 3616-30).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 6, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (U. S. C. Title 28, Sec. 347 (a)), and the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

On April 6, 1942, the Court below granted petitioner's motion to stay the issuance of its mandate pending the application to this Court for a writ of *certiorari*.

Statement of the Case.

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

Specification of Assigned Errors To Be Urged.

It is intended to urge the following errors:

I—It was reversible error to admit Government Exhibit 148.

II—The Court below committed reversible error in refusing to limit the issues to business expense deductions and in giving a confusing charge regarding gambling.

III—The petitioner was fundamentally deprived of a fair trial because the jury were not correctly instructed on the law, through (a) conflicting instructions on the elements of the crime; (b) refusal to charge that a deduction of a proper item claimed at the trial, though not claimed on the tax return, should be allowed; (c) refusal to define "ordinary and necessary" and substitution of the test of "legitimate"; (d) the erroneous instruction as to the law dealing with the making of an estimate; and (e) erroneous charge regarding deductibility of business entertainment expenses at home.

IV—The exclusion of the testimony of a revenue agent subpoenaed by the petitioner constituted reversible error and deprived petitioner of constitutional rights.

V—The refusal to charge as requested and the erroneous charge regarding the weight to be given to character evidence constituted reversible error.

ARGUMENT

POINT I.

It was reversible error to admit Government Exhibit 148. It was not supported by evidence. If it represented the U. S. Attorney's opinion, it was hearsay. If it was intended as a hypothetical question, its hypotheses were inarticulate and unparticularized.

There is no basis in the evidence* except the fact of Mr. Correa's direction to support the disallowance of expenditures as shown in the exhibit. The burden lodges with the Government throughout the trial and it is the inescapable burden of the Government to prove that disallowed expenditures were of a non-business character. The record reveals that this burden was not met and that the disallowances are unsupported by evidence other than the statement of the witness that he disallowed the items because Mr. Correa told him to (R. 1008; 3628).

In so far as the exhibit purports to record what Mr. Correa said, it is hearsay.

The admission of the exhibit cannot be supported as a hypothetical question, as contended by the Government, because the witness did not base the conclusions in the exhibit on assumptions given to him, and the jury were not

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* The Court below held: "Evidence was presented tending to prove that of the $38,399.21 of cash, deducted at the 50% rate, $10,000. represented a gambling debt * * *" (R. 3623). If this were a correct statement, the Government would have shown that more than 50% of this cash item was personal. However, the Court below, as well as the Trial Court and counsel during the trial, erred as to this $10,000. item. The error was the belief that no $10,000. item of cash spent existed other than Check #4457 (R. 2136), and this check was proven to have been a gambling expenditure. The correct fact, however, was that cash Check #3490 for $10,000. (R. 2202), not #4457, was the proper check embraced within the total of $38,399.21. As to Check #3490, there was no proof whatever of non-business purpose. The serious effect of this error during the trial appears from the cross examination of petitioner (R. 1638-40, 942, 1195, 1196). The unfortunate persistence of this error appears from the above quotation from the opinion below.

told what the factual bases were nor that these bases were only assumptions, the correctness of which it was their function to decide. The witness was not asked to assume anything. He and Mr. Correa decided in favor of the Government all the numerous controverted issues. Thus the essential element of a hypothetical question by which it is saved from invading the province of the jury was eliminated.

U. S. v. *Johnson*, 123 F. (2d) 111 (C. C. A. 7).

Whatever the bases actually used by the witness in preparing Exhibit 148, they were not stated in the form of assumptions. In the Government's brief to the Circuit Court of Appeals the admission of the exhibit is supported on the ground that it was a hypothetical question based on all the evidence (Brief for Appellee, p. 65). A hypothetical question cannot be based on all the evidence, but must be based on questions which the witness is asked to assume.

II *Wigmore on Evidence*, 3rd Ed. p. 800;
People v. *McElvaine*, 121 N. Y. 250 (1890).

The Court of Appeals in the *McElvaine* case said:

> "We think it is not competent in any case to predicate a hypothetical question to an expert upon all the evidence in the case, whether he has heard it all or not, on the assumption that he then recollects it, for it would then be impossible for the jury to determine the facts upon which the witness bases his opinion and whether such facts were proved or not."

The rule adopted by the Court below is in conflict with the rule adopted by the Circuit Court of Appeals for the Seventh Circuit.

U. S. v. *Johnson*, 123 F. (2d) 111 (C. C. A. 7).

This Court granted a writ of *certiorari* in the *Johnson* case on February 2, 1942. The case has now been assigned for reargument next October. Thus the Court has the question here presented pending for consideration before it. As pointed out in the petition, the Court below recognized that there was a conflict between the rule it adopted and the rule adopted in the Seventh Circuit, and stated in its opinion that it preferred to follow the dissenting opinion in the *Johnson* case.

POINT II.

The Trial Court committed reversible error in refusing to limit the 1936 issue to business expense deductions and in giving a confusing charge regarding gambling.

The Court below erred in sanctioning the refusal of the Trial Court to grant the request limiting the 1936 issue to deductible expenses. In so doing it applied an erroneous standard as a test for reversible error. It held that the petitioner had the burden to show affirmatively that the jury actually "was confused" and disregarded the established rule of law that where there is a "fair possibility" that the jury may have been misled reversible error has been committed.

McElroy v. *U. S.*, 164 U. S. 76;
Crawford v. *U. S.*, 212 U. S. 183;
Stromberg v. *California*, 283 U. S. 359;
Bruno v. *U. S.*, 308 U. S. 287;
McCandless v. *U. S.*, 298 U. S. 342;
Pierce v. *U. S.*, 314 U. S. 306;
Glasser v. *U. S.*, U. S. , decided January 19, 1942.

POINT III.

The petitioner was fundamentally deprived of a fair trial because the jury were not correctly instructed on the law through (a) conflicting instructions on the elements of the crime; (b) refusal to charge that a deduction of a proper item claimed at the trial, though not claimed on the tax return should be allowed; (c) refusal to define "ordinary and necessary" and substitution of the test of "legitimate"; (d) the erroneous instruction as to the law dealing with the making of an estimate; and (e) the erroneous charge regarding deductibility of business entertainment expenses at home.

(a) ***Conflicting instructions on the elements of the crime.***

The Court charged that the elements of the crime, under the first three counts, were two: (1) whether defendant Schenck owed more than he reported, and (2) whether there was a wilful intent to evade and defeat any part of the tax by filing a fraudulent tax return. Later, referring to the same crime for 1937 (Count three), he charged that the fact that Schenck may have overpaid his income tax for 1937 did not excuse him or Moskowitz from criminal liability (R. 1838). These inconsistent definitions of the crime constitute reversible error. Referring to this charge, the Court below said:

> "This is likewise true of that portion of the charge complained of because it told the jury that a conviction could be had even though no additional tax was due. Having been acquitted upon the third count, the appellants were obviously not prejudiced by any errors in the instructions directed to this count. Moreover, the court had clearly stated previously that the first ele-

ment of the crime in the first three counts was whether Schenck 'owed more tax than he reported.' "

Thus the Court below gave two reasons for holding that the admitted error in the Trial Court's charge was non-prejudicial. First, because the second part of the charge referred to 1937, the year on which petitioner was acquitted, and did not expressly refer to 1936, on which the petitioner was convicted. Second, even assuming that the incorrect charge applied to 1936, the Trial Court had previously given a correct charge for that year.

With respect to the additional reason for non-prejudice given by the Court below, to wit, that the Trial Court had previously given a correct charge of the elements of the crime, the opinion of the Court below lays down an astounding and dangerous rule of law, namely that a Trial Court may give a correct charge on the essential elements of a crime, and later an utterly contradictory and erroneous charge on the same subject, without committing reversible error. Such a rule nullifies the function of a Trial Court as the officer charged with the duty of giving the jury the law, and permits the jury to decide not only the facts, but also the law applicable. Here is a departure from the usual course of judicial proceedings. The Court below sanctions such a departure by holding the error non-prejudicial. Courts in other circuits have taken a contrary view and have held a contradictory erroneous charge to be reversible error.

Nicola v. *U. S.*, 72 F. (2d) 780 (Third Circuit);
Kuhn v. *U. S.*, 42 F. (2d) 210 (Third Circuit).

This Court has also laid down the same rule.

Mills v. *U. S.*, 164 U. S. 644.

Such holding by the Court below should impel this Court to grant *certiorari.*

Furthermore, the Court below held that because the concededly erroneous part of the charge expressly referred to 1937, upon which there was acquittal, and did not refer to 1936, upon which there was conviction, petitioner was "obviously" not prejudiced. The jury were told first that the elements of the crime were the same for all three years. They were later given a concededly erroneous charge with respect to the elements of the same crime for 1937. There is a grave possibility, and indeed probability, that they inferred that the erroneous charge for 1937 also applied to 1936, and that they might convict for 1936 even though no additional tax was due. Certainly there is nothing in the record to show that they did not draw such an inference. This Court has held that an erroneous charge on one count, which had a prejudicial effect upon the defendant with regard to other counts, is ground for reversal of a conviction of such other counts.

Graves v. *U. S.,* 165 U. S. 323.

This Court has frequently held that substantial error is reversible unless it appears so clearly as to be beyond doubt that there was no prejudice and could have been none.

McElroy v. *U. S.,* 164 U. S. 76;
Crawford v. *U. S.,* 212 U. S. 183.

And where, as in this case, it cannot be known how much the jury were influenced by error, this Court has held the error is reversible error.

Stromberg v. *California,* 283 U. S. 359.

(b) ***The refusal to charge that a deduction of a proper item claimed at the trial, though not claimed on the tax return, should be allowed.***

There was evidence that Schenck had omitted to take in his income tax return certain deductions to which he was regularly entitled. Petitioner requested the Trial Court to charge (R. 1862) that "even if the taxpayer did not claim the item at all in his return, if it be a proper adjustment he is entitled to it, and this rule must be taken into consideration in determining whether there was in fact any tax due over and above that which he paid" (R. 1862).

The Trial Court refused the requested instruction and gave no instruction at all on this topic. The request unquestionably laid down a correct rule of law. Certainly it is correct law in the determination of an additional tax due in *civil* tax cases. The Court below has itself so held in civil tax cases.

> *Internat'l Banding Machine Co.* v. *Commissioner,* 37 F. (2d) 660, 662.

The Board of Tax Appeals has likewise so held.

> *Gutterman Straus Co.,* 1 B. T. A. 243;
> *Davison-Joseph Realty Co.,* 41 B. T. A. 675.

And this Court has applied a similar rule in the determination of refunds, by holding that in computing an overpayment the entire tax liability for the year must be redetermined.

> *Lewis* v. *Reynolds,* 284 U. S. 281.

Certainly in a criminal tax case, where an element of the crime is whether an additional tax is due, the same rule,

that the entire tax liability must be redetermined, should apply.

We conceive the law to be that the refusal to grant such a request, correct in law, and not otherwise covered by the charge, is reversible error. The reason is that where there is a statute specifying the elements of a crime, there is an implied direction from Congress contained in such statute, within the reasoning of this Court in *Bruno* v. *U. S.*, 308 U. S. 287, that the Trial Court shall, upon request, clearly instruct as to such elements. This the Trial Court failed to do. Aside from such implied direction, we contend that the failure to grant such a request is reversible error where it cannot be said that the petitioner was not prejudiced. There is nothing to show what, if any, of the deductions claimed in the return the jury disallowed, and therefore it is impossible to say whether petitioner's proof of additional deductions would or would not have off-set the disallowed deductions. The Court below misapplied the case of *Paschen* v. *U. S.*, 70 F. (2d) 491, 502 (C. C. A. 7).*

(c) *The Trial Court erroneously refused to define "ordinary and necessary", and substituted the test of "legitimate".*

The deductions claimed herein were for expenses actually incurred. The money was spent. The issue was whether the expenses were deductible under the statute, 26 U. S. C. A. par. 23 (a) which provides (see appendix) that a taxpayer may deduct "all the *ordinary* and *necessary* expenses paid or incurred during the taxable year in carrying on any trade or business." (Italics ours.)

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* That case is clearly distinguishable. In that case the Court did charge the jury that they might consider unclaimed deductions, and though the Court erred as to degree of proof, no exception was taken to the erroneous charge. In the *Paschen* case there was practically no dispute with the Government's adjustment that the omitted income far exceeded the unclaimed deductions, whereas in the case at bar, no such undisputed excess appears.

In *Welch* v. *Helvering*, 290 U. S. 111, Mr. Justice Cardozo in defining "ordinary" said:

> "Now, what is ordinary, though there must always be a strain of constancy within it, is none the less a variable affected by *time*, *place* and *circumstance* * * *." (Italics ours.)

In *Deputy* v. *Dupont*, 308 U. S. 488, Mr. Justice Douglas, in defining "ordinary" said:

> "One of the extremely relevant circumstances is the nature and scope of the *particular business* out of which the expense in question accrued * * *. It is the kind of transaction out of which the obligation arose and its normalcy in the *particular business* which are crucial and controlling." (Italics ours.)

Also in *Welch* v. *Helvering*, *supra*, Mr. Justice Cardozo, in discussing the word "necessary", said:

> "We may assume that the payments to creditors of the Welch Company were necessary for the development of the petitioner's business, at least in the sense that they were *appropriate and helpful*." (Italics ours.)

The words "ordinary" and "necessary" are not so clear and unambiguous in their meaning and application as to leave no room for further instructions. *Textile Mills Security Corp.* v. *Commissioner*, 62 S. Ct. 272, 279.

The defense requested the Court to charge that for an expenditure to be deductible as a business expense, the law requires only that it be an "ordinary" and "necessary" expense incurred in the carrying on of a trade or business, the words "ordinary" and "necessary" in this connection

meaning "appropriate" and "helpful", and that "in determining whether an expense was in fact an 'ordinary' and 'necessary' business expense, regard must be given to all of the circumstances, including time, place, nature of business, nature of the individual, standards of the industry, expenses customarily made by others in the same line of business, and other similar circumstances" (R. 1868).

The Trial Court ignored these requests. The Court below did not say that petitioner's requests incorrectly stated the law. The Court below held that it was sufficient if the jury were told that the expenses were deductible if they were "legitimate" or "necessary and legitimate" or "ordinary and necessary" (R. 1841-2). Actually the Trial Court emphasized the word "legitimate" by repeating it five times within ten lines (R. 1841).

The meaning and application of the words "ordinary and necessary" have proved most difficult for bodies charged with the administration of the income tax law and for income tax experts. The trial of the crime of attempted tax evasion imposes upon a lay jury the duty of determining the existence of one of the elements of the crime, namely, whether an additional tax is due. It should be the duty of the Trial Court in such a case to give the jury all possible assistance, particularly in a complex case such as the instant one. The failure to give the requested charge resulted in the fatal defect of depriving the jury of the proper standard to apply.

The jury were not told that "ordinary" meant "ordinary" for the particular taxpayer in the motion picture industry, or that they must consider all the other circumstances pointed out in the requests to charge. They were not told that "necessary" meant not a rigorous test of absolute imperative necessity but only "appropriate or helpful." They might well have applied their own particular standards of what was ordinary and necessary in their own daily lives. With-

out proper instruction, they could not be expected to know what the law required as to what standards to apply. Kinds of entertainment and amounts of entertainment foreign to their own experience could be regarded by them as not ordinary and necessary, even though it might well have been ordinary and necessary expenditure for the petitioner in his business. It would be natural for a jury not to understand that expenses such as some of those incurred by Schenck in lavishly entertaining people in the motion picture industry and prospective actors, actresses and writers, were "ordinary" or "necessary" expenses. The usual layman may consider an expense of this kind either extraordinary or unnecessary as measured by his own standards.

In view of the clear law on the meaning of "ordinary and necessary," the failure of the Trial Court to grant the requests is inexplicable. The decision of the Court below in sustaining the action of the Trial Court is clear prejudicial error, and is in conflict with the principles enunciated by this Court in the cases herein cited on pages 25, 31 and 36.

The administrative bodies charged with enforcing tax law have recognized that the moving picture industry has its own standards of entertainment. In *Hal E. Roach Studios*, 20 B. T. A. 917, the Board said in referring to the motion picture industry:

> "Its criteria of what are ordinary and necessary are very different from most businesses."

In *Madge H. Evans*, B. T. A. Mem. Op. C. C. H. Decision #10,620-d the Board said, with reference to business expense deductions of a motion picture actress:

> "Maintenance of her position in the industry required certain expenditures that would be unnecessary for the average person engaged in business * * *. In deciding

whether the disbursements made by the petitioner were ordinary and necessary expenses of her profession we must examine the disbursements from the standpoint of their relation to her business and in the light of the 'time, place and circumstance' under which they were made."

(d) ***The Trial Court erroneously instructed the jury as to the law dealing with the making of an estimate.***

Many of the items of expenditure, particularly entertainment expenditure, were incurred partly for business purposes and partly for personal purposes. The taxpayer made an estimate of the proportion of these expenditures properly chargeable against business, and used that estimate in making his return. It was impracticable to sit down and go over each item or bill. Such a laborious process might have eliminated a few items, but in the last analysis the taxpayer would have had to estimate business expenses (R. 1662-3). The method by which the estimate was made is described in the testimony in detail (R. 1496-7). The Trial Court held that the taxpayer had a right to resort to estimate only after exhausting all available sources of information. This erroneous holding was sustained by the Court below (R. 3624). This ruling was wrong. It places a burden upon the taxpayer to make an audit of all obtainable information without limit and denies the privilege of estimate except where there is not only no knowledge but no possible means of obtaining information. Such a standard goes far beyond any basis in use by taxpayers, and far beyond any reasonable standard for determining criminality.

It was error for the Trial Court to instruct, and the Court below sustained this, that there is only one method to estimate deductible business expenses. In the absence of Statute or Regulations, any fair method may be used.

This complicated case required the simplest and clearest statement from the Court as to the law on the important subject of estimates. The Court's charge was such that no lay jury could fairly be expected to understand it.

(e) ***The Trial Court gave erroneous instructions as to Schenck's right to deduct business entertainment expenses at home.***

The facts in this connection are summarized under Point III (e) of the matters involved in the petition. The requested charge correctly sets forth the law on the subject. The Board of Tax Appeals has held that if one's home is used partly for entertainment for business purposes, a part of the expense of running the home may properly be deducted as a business expense. Instead of giving the correct charge, as requested, the Court modified the request, and after charging that personal living and family expenses were not deductible, gave the following charge (R. 1841):

> "Traveling and living expenses, while away from home, and entertainment, can be deducted as business expenses if the traveling and living expenses and entertainment are legitimate expenses incurred in the carrying on of a business."

We contend that the word "entertainment" in the above quotation must be read in connection with the words "traveling and living expenses," and as so read is subject to the same limiting words "away from home." If that interpretation is correct, then the charge was entirely inadequate and was silent as to the taxpayer's right to deduct entertainment expenses "at home." If the Trial Court intended to instruct the jury that entertainment expenses for business purposes at home were not deductible, then the charge

was erroneous. *Ned Wayburn,* 32 B. T. A. 813; *Julius Forstmann,* 6 B. T. A. 21; *Edwin T. Pollock,* 10 B. T. A. 1297; *Joe May,* 39 B. T. A. 946.

The question determined by these cases has never been passed upon by this Court. It involves the interpretation of federal income tax statutes, and affects many taxpayers.

If the Trial Court intended to charge that entertainment expenses for business purposes at home were deductible, then his modification of the requested charge resulted in an ambiguity which deprived the petitioner of the clear statement of the law to which he was entitled.

> "It is not sufficient that an instruction be so drawn that a jury may reach the right conclusion, but it is required that it be so framed that the jury may not draw the wrong conclusion therefrom." *Miller* v. *U. S.,* 120 F. (2d) 968, 972 (C. C. A. 10).

In *Egan* v. *U. S.,* 287 Fed. 958, the Court of Appeals for the District of Columbia said, at page 970:

> "The defendant is entitled to have the law of the case clearly and concisely stated to the jury, and it is error to refuse prayers which specifically state the law applicable to a certain branch of the testimony, and substitute therefor a charge which, to the legal mind, may contain the correct principle, but so involved in its verbiage as to tend to confuse rather than enlighten the average juror."

POINT IV.

The exclusion of the testimony of Revenue Agent Mulligan constituted reversible error and deprived petitioner of constitutional rights.

The facts regarding the exclusion of Agent Mulligan's testimony are summarized in the petition in Point IV of the matters involved. The Court below ruled that no constitutional question was presented by the record. Such holding is in conflict with the ruling of this Court in *McCandless* v. *U. S.*, 298 U. S. 342, that a specific offer of evidence is not needed where an entire class of evidence has in advance been formally declared inadmissible by the Trial Court during a preliminary argument or colloquy. The ruling also is in square conflict with the established law as set forth in legal treatises. Professor Wigmore has stated the law as follows:

> "But a specific offer of evidence is not needed where an entire class of evidence has been in advance formally declared inadmissible by the Trial Court during preliminary argument or colloquy; for the Court's ruling relates forward to all possible offers of such evidence and renders them needless. Moreover, after such a ruling, the persistence of counsel in making or repeating such offers may be treated as improper attempts to get before the jury the effect of such evidence."
>
> I *Wigmore on Evidence*, 3rd Ed., p. 318.

The validity of the regulations upon which the testimony was excluded was thus squarely raised and the record therefore presented a constitutional question. The refusal of the Court below to pass on the constitutional question presented

deprived the petitioner of his constitutional rights under the Sixth Amendment.

Glasser v. *U. S.*, U. S. , decided January 19, 1942.

POINT V.

The refusal to charge as requested and the charge regarding the weight to be given to character evidence constituted reversible error.

The Court in its charge minimized the importance of this testimony (R. 1829-30). The specific point of difference between the charge as given and as requested was the very important one that character evidence might itself, considered with all the other evidence, be deemed sufficient to raise a reasonable doubt. The Court did not so charge. Instead it placed character evidence in the same category with all other evidence and then proceeded to caution against excuse or leniency (R. 1829-30). To this extent the charge was entirely one-sided. This Court in *Quercia* v. *U. S.*, 289 U. S. 466, squarely held that the privilege of the Judge in a criminal case to comment on the facts has its inherent limitations. The discretion of a trial Judge is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. The influence of the trial Judge on the jury is necessarily and properly of great weight and his slightest word or intimation is received with deference and may prove controlling. Among the limitations laid down by the *Quercia* case was a limitation that the Court may not give a "one-sided" comment on the evidence. The Court below in holding that the Trial Court correctly instructed regarding the weight to be given character evidence, made a ruling which is in probable

conflict with the principles enunciated by this Court in the *Quercia* case.

The weight to be given to character evidence has not been passed on by this Court since *Edgington* v. *U. S.*, 164 U. S. 361 (1896). Confusion on the subject exists in the opinions of various Circuit Courts of Appeals: *Egan* v. *U. S.*, 287 F. 958 at 968-969 (Ct. of App. D. C. 1923); *Jones* v. *U. S.*, 289 F. 536 at 538-539 (Ct. of App. D. C. 1923); *Roth* v. *U. S.*, 294 F. 475 at 482 (C. C. A. 6th 1923); *Sunderland* v. *U. S.*, 19 F. (2d) 202 at 214-216 (C. C. A. 8th 1927); *Estabrook* v. *U. S.*, 28 F. (2d) 150 at 154 (C. C. A. 8th 1928); *Cohen* v. *U. S.*, 282 F. 871 at 872-873 (C. C. A. 3rd 1922); *Miller* v. *U. S.*, 120 F. (2d) 968 (C. C. A. 10th 1941).

CONCLUSION.

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of *certiorari* should be granted.

Dated, New York, May 7, 1942.

Respectfully submitted,

JOHN W. DAVIS,
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Of Counsel.

APPENDIX.

Government's Exhibit 148.

Chart Gibney's Computation re Schenck's 1936 Return

BK
84222
C107-440

JOSEPH M. SCHENCK

Income Tax Return Year 1936

Comparative statement showing Income and Deductions per return and as adjusted.

Line No. in Return	*Items of Income*	*Reported On Return*	*As Adjusted*	*Difference*
(1)	Salaries, etc. (Net) See Schedule 1	$85,323.40	$132,016.50	$46,693.10
(3)	Interest Received	14,294.63	22,575.30	8,280.67
(6)	Dividends	385,905.63	385,905.63	
(9)	Rents & Royalties (or Loss)	(12,257.62)	(7,158.09)	5,099.53
(10)	Capital Gains (or Loss)	6,077.04	6,212.04	135.00
(11)	Other Income	23,279.46	23,382.98	103.52
(12)	Total Income	502,622.54	562,934.36	60,311.82
	Items of Deduction			
(13)	Interest paid	2,652.74	1,937.74	715.00
(14)	Taxes paid	18,065.83	16,807.83	1,258.00
(16)	Bad debts	5,000.00		5,000.00
(17)	Contributions	15,243.00	11,893.00	3,350.00
(18)	Other deductions	27,754.24	9,822.60	17,931.64
(19)	Total Deductions	68,715.81	40,461.17	28,254.64
(20)	NET INCOME	$433,906.73	$522,473.19	$88,566.46
	Tax due at rates applicable to a single person under the Revenue Act of 1936	257,636.85	321,834.16	64,197.31

Government's Exhibit 148.

BK
84222
C 107-440

JOSEPH M. SCHENCK
Year 1936

SCHEDULE 1.

Schedule showing analysis of Salaries, etc.
(line 1 of the return).

	Received from	*Reported*	*As Adjusted*	*Difference*
	Twentieth Century-Fox	$130,000.00	$132,500.00	$ 2,500.00
(a)	Less: Expenses	44,676.60	483.50	44,193.10
	Net Salaries	85,323.40	132,016.50	46,693.10

(a) "Expenses paid and incurred in earning salary and not reimbursed from any source"

"Travelling and entertainment:

Hotel Expense	$ 4,792.46
Railroad Transportation & Entertainment	39,884.14
Total Expense re business	$44,676.60"

Details of Expenses, shown above.

Items	*Amount*	*Percent Claimed*	*Amount Claimed*	*Amount As Adjusted*	*Difference*
Cash checks	38,399.21	50%	19,199.10	—	19,199.10
Dues & Memberships	715.76	100%	715.76	137.00	578.76
Hotel expense	4,792.46	"	4,792.46	—	4,792.46
Cafe expense	2,021.30	"	2,021.30	—	2,021.30
Tickets	646.50	"	646.50	346.50	300.00
Flowers	1,341.36	"	1,341.36	—	1,341.36
Yacht Rental	584.19	"	584.19	—	584.19
Race Tickets	400.00	"	400.00	—	400.00
Palm Springs House expense	5,000.00	50%	2,500.00	—	2,500.00
House expense	24,951.87	50%	12,475.93	—	12,475.93
Totals	78,852.65		44,676.60	483.50	44,193.10

Statutes and Regulations Involved.

Revenue Act 1936.

"Sec. 23 *Deductions from Gross Income*

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business * * * "

"Sec. 145 *Penalties*

* * * * *

(b) * * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Treasury Department Regulations, dated August 15, 1938, 31 C. F. R. 1938, Supp. 1, 3; D. C. 591 Sec. 3:

"Treasury Department Officers and employees are prohibited from testifying in court or otherwise with respect to information obtained as a result of their official capacities, without the prior approval of the Secretary, the Under Secretary, an Assistant Secretary, the administrative assistant to the Secretary, or the head of the bureau, office or division of the Department in which such officer or employee is employed."

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1225

JOSEPH H. MOSKOWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 3616–3630) is as yet unreported. The District Court rendered no opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 6, 1942 (R. 3631). The petition for a writ of certiorari was filed in this Court on May 8, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rule XI of the Criminal Appeals Rules, promulgated by this Court, May 7, 1934.

QUESTIONS PRESENTED

1. Whether it was error for the trial court to admit Government's Exhibit 148, which charted the computations of an accountant.

2. Whether the trial court's charge failed adequately to explain the issues involved in count two of the indictment.

3. Whether the petitioner was deprived of a fair trial because of various other instructions given or refused.

4. Whether the exclusion of testimony by an Internal Revenue Agent constituted reversible error.

5. Whether the trial court's charge on character evidence was fair and proper.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) * * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

STATEMENT

On June 3, 1940, petitioner and Joseph M. Schenck were jointly indicted in the Southern District of New York (R. 3). The indictment in the first three counts charged petitioner and Schenck with attempts to evade and defeat Schenck's income tax liability for the calendar years 1935, 1936 and 1937, respectively. The fourth count contained a conspiracy charge (R. 8–25). Schenck was convicted on counts one and two, relating to the years 1935 and 1936, and petitioner was convicted only on count two relating to the year 1936 (R. 1857).[1] Both defendants appealed and the convictions were affirmed by the Circuit Court of Appeals for the Second Circuit (R. 3631). Petitioner alone seeks certiorari.

Petitioner was the personal and financial business agent of Schenck, who had been long associated with the moving picture industry and who, in 1936, became chairman of the board of directors of Twentieth Century-Fox Film Corporation (R. 38). He had begun to work for Schenck in 1918 (R. 1470) and has been representing Schenck's various interests since that time (R. 1485). He was in charge of Schenck's personal records in New York (R. 315), which included a complete set of double entry books, complemented by a voucher system (R. 46, 316, 319). Another set of books

[1] Petitioner was sentenced to imprisonment for a year and a day and was fined $10,000 (R. 3350).

and records was maintained for Schenck in Los Angeles (R. 38–42), but these were treated as subsidiary to the records in New York (R. 52), and the Los Angeles bookkeepers were under the supervision of petitioner and Schenck, and submitted reports, weekly, monthly and yearly, to petitioner in New York (R. 52–53, Exs. 10–16, R. 1939–2570).

Petitioner's duties as Schenck's agent included the preparation of his income tax returns. The actual forms themselves were filled out by one Schadler, an employee of Loew's, Inc. (R. 336–337), but Schadler had no personal knowledge of Schenck's affairs and saw none of the records (R. 342), and all the information and figures, including the percentages at which claimed business expenses were to be calculated, were supplied by petitioner (R. 344).

For the year 1936 the defendants deducted from $130,000 in salaries reported by Schenck $44,676.60, which they represented as "Expenses Paid and incurred in earning salary and not reimbursed from any source" (Ex. 2, R. 1914). The vouchers and other records of Schenck in evidence, as well as the testimony of those upon whom these monies were spent, showed these expenditures to be almost entirely of a personal nature[2] No substantial

[2] See *e. g.*, Gibney's analysis (R. 934–958); testimony of and concerning persons upon whom monies were spent (R. 514, 515, 517, 522, 531–532); testimony of Harpo Marx (R. 221 ff.), Chico Marx (R. 236 ff.), Grace Poggi (R. 385 ff.), Audrey Sutherland (R. 402 ff.), Janice Pierce

credible evidence was adduced by the defendants to support their contentions that Schenck entertained lavishly for the benefit of his business interests, and the evidence disclosed rather that Schenck's entertaining was closely confined to his relatives and intimate friends, including gambling and women companions (see footnote 2, *supra*, p. 4). Furthermore, his contract of employment provided for his reimbursement for traveling and living expenses while away from home (Ex. 90, Par. 6, R. 2773), and he was reimbursed generally for any expenses which he incurred, even remotely, on behalf of the film corporation (R. 136–143, 375–378, 527–530).

The true nature of the expenditures was known to petitioner, for not only was he intimately acquainted with Schenck's affairs, but the vouchers maintained both in Los Angeles and in New York showed the minute details of almost all transactions (see excerpts from Exs. 7, 8, 9, 78, 79, 80, R. 3095–3334), and the weekly reports which petitioner received from those in charge of the Los Angeles books transcribed the details which appeared on the face of the vouchers (Exs. 10, 11, 12, R. 1939–2500).

The court below held that the case was fairly tried and correctly submitted to the jury (R. 3630).

(R. 408 ff.), Jacob Paley (R. 411 ff.), and Lou Wertheimer (R. 480 ff.); as well as excerpts from vouchers and attached memoranda (Exs. 7–9, 78–80; R. 3114–3126, 3130–3149, 3160–3169, 3181–3205, 3238–3247, 3260–3262, 3278–3280, 3331–3334).

ARGUMENT

I

No reversible error was committed in the admission in evidence of Government's Exhibit 148 (R. 934, 2881–2882). Inasmuch as this exhibit was no more than a representation in tabular or chart form of a portion of the testimony given by the computer Gibney, the Government assumes that the objections of the petitioner are directed rather toward the testimony given by Gibney than toward the incorporation of that testimony in Exhibit 148. The propriety of using a chart merely for the convenience of the jury, which was instructed that the original exhibits were to control (R. 903), is well established. *United States* v. *Mortimer*, 118 F. (2d) 266, 269–270 (C. C. A. 2), certiorari denied, 314 U. S. 616; *United States* v. *Park Avenue Pharmacy*, 56 F. (2d) 753, 756 (C. C. A. 2).

Petitioner, in contending that Gibney's testimony, if regarded as the reply to a hypothetical question, is in conflict with *United States* v. *Johnson*, 123 F. (2d) 111, 127–128, 142 (C. C. A. 7), certiorari granted, February 2, 1942, Nos. 799–800, this Term (Pet. 15–16, Br. 23–35), seems to have misconceived the basis upon which this testimony was elicited by the Government. Gibney's testimony was, first, an accountant's breakdown of the tax returns and schedules prepared by the defendants,

and second, a computation of the amount of tax which would be due if certain items selected by the United States Attorney were included or excluded (R. 900–903, 986, 999–1005, 1054–1063, 1075–1078). It is this second portion only of his testimony which the Government offered as the response to a hypothetical question. The witness Gibney was asked to assume the inclusion or exclusion of certain items, and then as an expert in the computation of income taxes, he was asked to state what the tax would be. The assumptions of the hypothetical question were merely the inclusion and exclusion of items. These assumptions were explained to the jury in detail by having the witness Gibney break down the total figures appearing on Exhibit 148, representing the totals of categories included or excluded in the exhibit, and point out to the jury just what items went into the composite totals. No discretion was left to Gibney to include or exclude any item, but as was repeatedly pointed out to the jury (R. 900, 904, 986), the inclusion or exclusion was directed by the United States Attorney. The only function left to Gibney was to compute the tax on the basis of the figures adjusted by the inclusion and exclusion of the various items.

The assumptions of the hypothetical question rested simply on the facts of the making of certain payments by Schenck, as to which there was

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entirely adequate foundation in the record, and indeed no dispute at the trial. (See footnote 2, *supra,* p. 4; R. 1161.) The character of these payments for tax purposes as deductible business expenses or nondeductible personal expenses was the ultimate question for the jury and the weight of the evidence as to this does not enter into the question of the propriety of a hypothetical question limited as here to a mere mathematical computation of a tax.

The *Johnson* case, *supra,* relied upon by petitioner, is distinguishable, as was recognized by the court below (R. 3628–3629). In that case the decision of the Circuit Court of Appeals proceeded on the *form* of the general hypothetical question asked. This is shown by the decision of the same court in the later related case of *United States* v. *Skidmore,* 123 F. (2d) 604, 609, certiorari denied, February 2, 1942, No. 813, this Term. Here the direct examination of the accountant was in different form and included the most minute description of the basis for the witness' conclusion as to the tax due prior to the expression of that conclusion.

II

Petitioner asserts that the trial court erred in refusing to grant the request for additional instructions limiting the issue as to 1936 to deductible expenses (Pet. 16, Br. 25). It is argued that such

further instructions were necessary to prevent the jury from being confused as to the probative significance of certain evidence concerning gambling income (Pet. 6–7). Petitioner states that on this issue the Circuit Court of Appeals "held that the petitioner had the burden to show affirmatively that the jury actually 'was confused' and disregarded the established rule of law that where there is a 'fair possibility' that the jury may have been misled reversible error has been committed" (Br. 25).

We find no such holding in the opinion of the Circuit Court of Appeals. On the contrary, that court held that it is not reasonable to believe that the jury could have been confused on the issue. Specifically, the Circuit Court of Appeals said (R. 362–3626):

> The contention that the jury was confused as to the crime charged in the second count cannot be maintained. The jury was informed at the outset that the charge as to the 1936 return was the fraudulent assertion that Schenck had deductible expenses authorized by law in excess of about $40,000. The instruction as to failure to report income derived from gambling transactions cannot reasonably be read as referring to the second count. It plainly related to the third count, which charged the receipt of $100,000 more income than was reported.

There is no substance to petitioner's argument that the court below applied an erroneous standard, and none of the cases cited is in point.

III

The third reason assigned for the granting of certiorari is the contention that petitioner was denied a fair trial because of certain other instructions given or refused. (Pet. 16–17; Br. 26–36).

(a) One of the elements of the crime, the petitioner contends, is the existence of a deficiency in tax over and above the amount which the taxpayer paid. The trial court gave two separate instructions (R. 1827, 1836) which completely accord with that contention. However, with respect to the third count of the indictment, involving the year 1937 and strictly confined to that count the court charged that an overpayment of tax for the year 1937 would not relieve of criminal liability (R. 1838). Petitioner contends that he was prejudiced by the latter charge.

The statute makes no reference to the requirement of a deficiency in tax, providing simply that "any person who willfully attempts in any manner to evade or defeat any tax imposed by this title" shall be guilty of a crime. Although there is basis for the view that the existence of a deficiency in tax is not properly an element of the crime and that the charge with respect to the third count is correct, there is no need to discuss that question here since it is clear that petitioner was not prejudiced.

The emphatic manner in which the trial court limited the charge under attack to the year 1937[3] disposes of any possibility of confusion on the part of the jury and makes it inconceivable that any harm could have resulted to petitioner. The court had good reason for restricting the criticized instruction to the third count of the indictment. Schenck's return for 1937 reported $456,969.68 as taxable dividends from Twentieth Century-Fox Film Corporation. At the trial it was contended that the dividends were not taxable because they represented a rteurn of capital, and that there was therefore no deficiency for 1937 (R. 1266–1304,

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[3] The part of the charge in question reads as follows (R. 1838):

"With respect to the defendant Schenck's income tax return for the year 1937, there has been certain testimony adduced which the defendants contend tends to prove that there was an overpayment of the taxes due for that year. The defendants call your attention specifically to the dividend on the stock of Twenty Century-Fox Film Corporation, which they contend was a capital distribution rather than a distribution of income. In determining whether the defendants Schenck and Moskowitz or either of them have been guilty of a wilful and knowing attempt to evade and defeat the payment of taxes imposed for the year 1937, I charge you that the mere fact that the defendant Schenck may have overpaid his income tax for the year 1937 does not excuse either him or the defendant Moskowitz from criminal liability if you find that there was some net taxable income for the year 1937 and that the defendant Schenck or the defendant Moskowitz or both of them wilfully and knowingly attempted to evade the tax imposed on that income."

1363–1453, 1790–1799). In these circumstances, the trial court had an obvious reason to limit the instruction in question to the year 1937, as the court indicated by specific reference to the dividend controversy. No similar issue was presented by the evidence as to the year 1936 (*Infra*, pp. 12–13).

The decision of the court below is not in any way in conflict with the cases cited by the petitioner. In *Mills* v. *United States*, 164 U. S. 644, this Court held that an erroneous instruction was not harmless merely because the correct rule was laid down in another portion of the charge. It does not appear, however, that there was more than one count; so both charges were applicable to the identical crime. The same situation was presented in *Kuhn* v. *United States*, 42 F. (2d) 210 (C. C. A. 3), and *Nicola* v. *United States*, 72 F. (2d) 780 (C. C. A. 3). In *Graves* v. *United States*, 165 U. S. 323, the counts to which the erroneous instruction applied and other counts were mutually dependent. In these circumstances, the erroneous charge necessarily had a prejudicial effect on the other counts to which the charge was not directly applicable. In the present case, the three counts were not interdependent and the charge as to the third count did not affect the second count, as to which alone there was a conviction.

(b) The trial court failed to instruct, as petitioner requested, that the taxpayer was entitled to a proper deduction, even if not claimed on the re-

turn, and that this rule must be taken into consideration in determining whether there was in fact any tax due over and above the tax paid (R. 1862).

As the request shows, the allowance of deductions not claimed on the return is important only in considering whether there was a deficiency. If the deductions not claimed were not large enough to wipe out the deficiency then the error, if any, in refusing the charge was harmless. Such was the case here, as the unclaimed deductions were either not allowable or inconsequential. As against more than $44,000 of deductions taken in 1936 which the evidence showed were fraudulent, petitioner in his brief in the court below (p. 29) was able to marshal only some $6,500 in identifiable items contended to be unclaimed business expenses. It is clear, therefore, that if any error was committed in failing to grant the requested instruction, such error was not prejudicial. See *Paschen* v. *United States,* 70 F. (2d) 491, 502 (C. C. A. 7).

Petitioner argues (Br. 30) that since it is not known which of the claimed deductions the jury disallowed, there is some possibility that the jury, by allowing the unclaimed deductions, might have arrived at no deficiency in tax. Such fine speculation cannot prevail in determining whether an error is prejudicial. The evidence must be viewed in the light most favorable to the Government. See *Glasser* v. *United States,* Nos. 30–32, this Term, decided January 19, 1942.

(c) Petitioner complains (Br. 30–34) that the trial court failed to give an adequate instruction on the nature of "ordinary and necessary" business expenses. A full paragraph of the charge was devoted to the definition of those terms and the instruction was given in plain, simple terms which the jury could easily understand (R. 1841). Petitioner's argument that error was committed because the charge did not repeat in detail the several definitions which were requested is groundless. Although the trial court's language was general, it fully covered the subject.

(d) On the subject of estimated business expenses, the jury was charged that a taxpayer may estimate such expenses only when he lacks information from which he can make an accurate allocation between personal and business expenditures (R. 1842–1843). This rule is in accord with the decision in *Cohan* v. *Commissioner,* 39 F. (2d) 540 (C. C. A. 2), and the petitioner has cited no case to the contrary. The argument that the taxpayer should be allowed to ignore available detailed information, as petitioner did, in deducting business expenses, requires no comment. Moreover, as the court below aptly pointed out, petitioner, in estimating, made "no effort to approximate accuracy" (R. 3624). Further, as to the criminality of the claimed deductions the trial court correctly

charged that the jury must consider whether the defendants acted with fraudulent intent (R. 1843).[4]

IV

The prohibition of testimony by Revenue Agent Mulligan did not constitute reversible error and provides no reason for the granting of certiorari. At the outset of their case petitioner and his co-defendant Schenck called to the stand, one after another, four Internal Revenue Agents: Mulligan, Colin, Jacobs and Yarmis (R. 1245, 1255, 1259, 1265). The record shows that Revenue Agent Mulligan never had anything to do with Schenck's tax returns, but had made an investigation of the 1937 return of Twentieth Century-Fox Film Corporation (Ex. 169 for identification, R. 2920). The information sought to be obtained from him, all within the knowledge of the defendants and available through other witnesses, concerned only their defense to the third count, that certain 1937 dividends reported by Schenck as taxable income were not taxable (R. 1251–1253; Ex. 169 for identification, R. 2920). The court excluded Mulligan's testimony because there had not been obtained, pursuant to a Treasury regulation, the permission of that Department for him to

[4] The contention that the jury was not sufficiently advised that Schenck might deduct entertainment expenses for business purposes at his home is baseless. See opinion, below, R. 3625, and the charge to the jury, R. 1841.

testify (R. 1252–1253; see also Defendants' Ex. A–43, R. 3078).

The information sought to be obtained from the witnesses Colin, Jacobs and Yarmis was of a different nature from that sought from Mulligan. Agent Colin was interrogated as to possible practices of the Treasury Department in estimating amounts to be allowed to taxpayers generally as deductions for business and entertainment expenses (R. 1254). The Government objected that such testimony would be immaterial, inasmuch as a practice of the Treasury Department in such regard, even if it existed, could not change the law (R. 1255). It was further objected that such testimony was out of order, and without proper foundation, because there had not yet been any evidence that a practice in that regard was known to the defendants or relied upon by them or even whether the defendants had computed deductions on an estimate basis (R. 1255–1259). The objection as to the order of proof was sustained by the court and the testimony of Agent Colin excluded at that time (R. 1258–1259). The court below found this ruling to be free from error, the order of proof being a matter over which the trial court has discretion. *Thiede* v. *Utah Territory,* 159 U. S. 510, 519.

The questioning of Agents Jacobs and Yarmis followed generally the lines of the questions put to Agent Colin, the emphasis being directed more,

however, to examination of tax returns of the defendant Schenck for years prior to those named in the indictment (R. 1259, 1264–1265, 1265–1266). Again the Government objected that the testimony was out of order, and that evidence as to returns for prior years was not relevant without a showing that the circumstances were the same and would prove no more than that the Government failed to pierce the fraud (R. 1260–1264; 1266). *Guzik* v. *United States,* 54 F. (2d) 618, 619 (C. C. A. 7), certiorari denied, 285 U. S. 545. The trial court excluded the testimony, again on the ground that it was out of the proper order of proof (R. 1259–1266).

Concerning the exclusion of Agent Mulligan's testimony, the court below held correctly that no constitutional question is presented for an appellate court to decide, for the only evidence which the petitioner sought to elicit dealt with the issues in the third count of the indictment, as to which there was an acquittal (R. 3630). Therefore, no prejudice could have resulted to petitioner. It is now argued (Pet. 12) that the trial court committed reversible error in excluding Mulligan's testimony because petitioner's counsel intended to inquire of this witness concerning any practice of the Treasury Department with respect to estimating amounts to be allowed as deductions for business and entertainment expenses. No such offer of proof was made or even intimated.

The ruling of the court below on this point presents no conflict with *McCandless* v. *United States,* 298 U. S. 342. The latter case held that where a general offer of a class of evidence is made and rejected, it is not necessary to make a more specific offer in order to raise on appeal the question of the admissibility of evidence falling within that class. The instant case is altogether distinguishable, for as to the witness Mulligan there was no offer of the class of evidence which the petitioner now contends was sought to be elicited.

V

The charge on character evidence (R. 1829–1830) was fair and proper and does not conflict with the decision of this Court in *Edgington* v. *United States,* 164 U. S. 361. Any confusion which has arisen as to the *Edgington* decision deals with a question not raised by petitioner.[5] See *Nash* v. *United States,* 54 F. (2d) 1006, 1007 (C. C. A. 2), certiorari denied, 285 U. S. 556.

Quercia v. *United States,* 289 U. S. 466, cited by petitioner (Br. 38), is obviously not in point.

CONCLUSION

The decision below is correct. There is presented neither an important question of law nor

[5] See discussion in the Government's briefs in opposition to two petitions for writs of certiorari recently denied by this Court: *Feinberg* v. *United States,* No. 807, present Term (pp. 13–14); *Boehm* v. *United States,* No. 810, present Term (pp. 14–16); certiorari denied in both cases, February 2, 1942.

a conflict of decisions. It is, therefore, respectfully submitted that the petition should be denied.

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